

Agenda Item Form

Agenda Date: 4/20/04

Districts Affected: A11

Dept. Head/Contact Information: Bill Chapman 612-24215

Type of Agenda Item:

- | | | |
|---|---|--|
| <input checked="" type="checkbox"/> Resolution | <input type="checkbox"/> Staffing Table Changes | <input type="checkbox"/> Board Appointments |
| <input type="checkbox"/> Tax Installment Agreements | <input type="checkbox"/> Tax Refunds | <input type="checkbox"/> Donations |
| <input type="checkbox"/> RFP/ BID/ Best Value Procurement | <input type="checkbox"/> Budget Transfer | <input type="checkbox"/> Item Placed by Citizen |
| <input type="checkbox"/> Application for Facility Use | <input type="checkbox"/> Bldg. Permits/Inspection | <input type="checkbox"/> Introduction of Ordinance |
| <input type="checkbox"/> Interlocal Agreements | <input type="checkbox"/> Contract/Lease Agreement | <input type="checkbox"/> Grant Application |
| <input type="checkbox"/> Other _____ | | |

Funding Source:

- ☐ General Fund
- ☐ Grant (duration of funds: _____ Months)
- ☒ Other Source: El Paso Community Foundation

Legal:

- ☒ Legal Review Required Attorney Assigned (please scroll down): None ☒ Approved ☐ Denied

Timeline Priority: ☒ High ☐ Medium ☐ Low # of days: _____

Why is this item necessary:

To be able to use Funds per contract with Community Foundation

Explain Costs, including ongoing maintenance and operating expenditures, or Cost Savings:

N/A

Statutory or Citizen Concerns: N/A

Departmental Concerns: N/A

Note: Please send Orig or Copy of Reso to Sylvia Firth as well as all Escrow Agreements
Thanks

RESOLUTION

BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF EL PASO:

That the Mayor be authorized to sign an Escrow Agreement by and between the City of El Paso, the El Paso Community Foundation, the El Paso Plaza Theatre Corporation, and PT Annex, LLC in connection with the contribution made by the El Paso Community Foundation for the Plaza Theatre Project; and that the Escrow Agreement approved by City Council on March 29, 2004 be revoked and that this document be utilized by the parties to govern the disbursement of funds.

ADOPTED this the 20th day of April 2004.

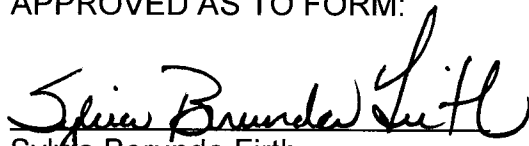
THE CITY OF EL PASO

Joe Wardy
Mayor

ATTEST:

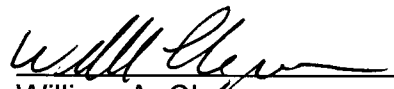
Richarda Duffy Momsen
City Clerk

APPROVED AS TO FORM:



Sylvia Borunda Firth
Assistant City Attorney

APPROVED AS TO CONTENT:



William A. Chapman
Deputy CAO Financial and
Administrative Services

ESCROW AGREEMENT

THIS ESCROW AGREEMENT (the "**Agreement**") is made and entered into effective as of the 20th day of April, 2004, by and between the CITY OF EL PASO, TEXAS, a Texas municipal corporation (the "**City**"), EL PASO COMMUNITY FOUNDATION, a Texas non-profit corporation, (the "**Foundation**"), EL PASO PLAZA THEATRE CORPORATION, a Texas non-profit corporation, (the "**Theatre Corp**"), and PT ANNEX, LLC, a Texas limited liability company, ("**PT Annex**").

WITNESSETH:

WHEREAS, pursuant to the terms and provisions of one certain agreement entered into on or about July 30, 2002, as amended by that certain First Amendment to Agreement entered into on or about March 29, 2004 (such agreement as amended by such First Amendment to Agreement and as such may be amended in writing hereafter by the parties, the "**Renovation Agreement**"), the City, the Foundation, the Theatre Corp, and PT Annex agreed to develop, improve, and renovate (collectively, the "**Renovations**") the El Paso Plaza Theatre and the adjacent Centre Annex so as to serve as a performing arts center (the "**Project**"); and

WHEREAS, without limitation upon other provisions and agreements contained in the Renovation Agreement, the Foundation, the Theatre Corp, and PT Annex agreed to assist the City in paying for the costs of the Project by granting to the City certain monetary sums in the amounts and at the times more fully provided in the Renovation Agreement (collectively, the "**Additional Money Grant**"); and

WHEREAS, the Renovation Agreement requires the Foundation, the Theatre Corp, and PT Annex to deliver for purposes of the Project portions of the Additional Money Grant, all pursuant to a written agreement to be had between the parties; and

WHEREAS, a purpose of this Agreement is to memorialize the agreement of the City, the Foundation, the Theatre Corp, and PT Annex with respect to such matters.

NOW, THEREFORE, for and in consideration of the mutual covenants contained herein, and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties hereto agree as follows:

1. The Project Account. The City, the Foundation, the Theatre Corp, and PT Annex do hereby agree that such Additional Money Grant delivered to the City by the Foundation, the Theatre Corp, and/or PT Annex pursuant to the Renovation Agreement shall be, as soon as possible following receipt thereof by the City, deposited by the City in a segregated account (i.e., an account in which no funds of the City other than the Additional Money Grant and any, if any, income thereon shall be held) with the financial institution which is the approved or authorized depository for City funds (the "**Project Account**").

(a) No funds of the Project Account may be subjected to lien, pledged, mortgaged, hypothecated, disbursed, or otherwise utilized except in accordance with the terms, conditions, and intentions of the Renovation Agreement and this Agreement.

(b) Subject only to the duty of the City to utilize the funds of the Project Account in accordance with Section 1(a) above and the Renovation Agreement and to the authority of PT Annex (as hereinafter provided in Section 1(c) below) to object with respect to certain disbursement requests relative to change orders regarding which a Foundation Affiliate (as defined in the Renovation Agreement) shall have assumed financial responsibility pursuant to the Renovation Agreement, no consent or authorization of the Foundation, the Theatre Corp, and/or PT Annex shall be required with respect to the Project Account (including, by way of example only and without limitation, any disbursements from the Project Account).

(c) It is understood that: (i) as the Project proceeds in accordance with the Renovation Agreement, certain costs will be incurred in connection with the Project and associated with change orders for which a Foundation Affiliate shall have assumed financial responsibility pursuant to the Renovation Agreement (the ***“Foundation Affiliates’ Change Orders”***); and (ii) from time to time, the City will be presented with bills or other requests for payments with respect to such Foundation Affiliates’ Change Orders (individually a ***“Foundation Affiliates’ Change Order Distribution Request”***, or if more than one ***“Foundation Affiliates’ Change Order Distribution Requests”***). The provisions of this Section 1(c) shall only apply with respect to Foundation Affiliates’ Change Order Distribution Requests and not with respect to any other costs, expenses, or distributions associated with the Project.

(1) Within a reasonable time following the City’s receipt of a Foundation Affiliates’ Change Order Distribution Request, the City shall provide in writing to PT Annex a copy of such Foundation Affiliates’ Change Order Distribution Request, which shall state the amount requested and describe: (i) the work performed; (ii) the materials provided; (iii) the services rendered; and/or (iv) any other costs which are incurred pursuant to the completion of the Project and are the subject of such distribution request.

(2) The Project architect retained by the City with respect to the Project: (i) shall verify that such Foundation Affiliates’ Change Order Distribution Request accurately reflects the work performed, materials provided, services rendered and/or other costs which are the subject of request; and (ii) shall have signed such distribution request. The City shall attach copies of supporting documents such as invoices, statements or bills to the Foundation Affiliates’ Change Order Distribution Request and deliver a copy of such distribution request to PT Annex.

(3) PT Annex shall have seven (7) business days after receipt of a Foundation Affiliates’ Change Order Distribution Request to object to or approve such distribution request. Any objection to a Foundation Affiliates’ Change Order Distribution Request must be in writing and state the reason for the objection with reasonable specificity. If PT Annex approves of, or fails to timely object to, a Foundation Affiliates’ Change Order Distribution Request, the City shall (in its sole discretion) be free to disburse moneys from the Project Account in payment of all or any portion of such Foundation Affiliates’ Change Order Distribution Request. If PT Annex objects to such Foundation Affiliates’ Change Order Distribution Request, the City and PT Annex shall reasonably cooperate with one another, the Project manager, and the Project architect to resolve such objection as soon as reasonably possible, but in all events within a commercially reasonable time.

(4) Nothing contained in this Section 1(c) shall serve to amend, diminish, or expand obligations of the parties to the Renovation Agreement, the purpose of this Section 1(c) being only to assist the parties in administering such obligations as are provided pursuant to such Renovation Agreement.

(c) Funds in the Project Account may (in the City's discretion) be invested by the City, with neither the Foundation, the Theatre Corp, nor PT Annex having any consent rights with respect to any (if any) such investment. Any and all income with respect to the Project Account shall augment the Project Account and be utilized with respect to the Project in accordance with this Agreement and the Renovation Agreement, with neither the Foundation, Theatre Corp, nor PT Annex having any rights with respect to any such income.

(e) Not less often than quarterly, and at other times within thirty (30) days following any written request to the City by the Foundation with respect thereto, the Foundation shall be provided a written accounting with respect to the Project Account (including, by way of example and without limitation, balances, income, and disbursement with respect thereto).

2. **Waiver.** Neither this Agreement nor any provisions hereof may be waived, modified, amended, discharged or terminated except by instrument in writing signed by the parties against which the enforcement of such waiver, modification, amendment, discharge or termination is sought and then only to the extent set forth in such instrument.

3. **Notices.** Any notices or communications hereunder must be in writing and shall be deemed to have been given at the earlier of the date when actually delivered, or when sent by telecopy or facsimile machine to the number shown below, or when properly deposited for delivery by a nationally-recognized commercial overnight delivery service, prepaid, or by deposit in the United States mail, certified or registered mail, postage prepaid, return receipt requested, and addressed as follows, unless and until any of such parties notifies the other in accordance with this Section 3 of a change of address or change of telecopy number:

(a) If to the City: The Honorable Mayor of El Paso
 City of El Paso
 2 Civic Center Plaza, 10th Floor
 El Paso, Texas 79901
 (Facsimile): 915-541-4501

with a copy to:

 City Attorney
 City of El Paso
 2 Civic Center Plaza, 9th Floor
 El Paso, Texas 79901.

(b) If to the Foundation,
the Theatre Corp or
PT Annex:

El Paso Community Foundation
El Paso Plaza Theatre Corporation
PT Annex, LLC
c/o El Paso Community Foundation
Cortez Building
310 North Mesa, Suite 1000
El Paso, Texas 79901
Attn: President
(Facsimile): 915-532-0716

with a copy to:

Scott, Hulse, Marshall, Feuille, Finger & Thurmond, P.C.
201 East Main, 11th Floor
El Paso, Texas 79901
Attn: G. Russell Hill, Esq.
(Facsimile): 915-546-8333.

4. **Survival.** This Agreement shall be binding upon and inure to the benefit of all parties hereto and their respective successors and assigns.

5. **Invalidity.** In the case any one or more of the provisions contained in this Agreement shall for any reason be held to be invalid, illegal or unenforceable in any respect, such invalidity, illegality or unenforceability shall not affect any of the provisions hereof, and this Agreement shall be construed as if that provision had never been contained herein.

6. **Time.** Time is of the essence in the performance of each provision of this Agreement.

7. **Jurisdiction.** This Agreement shall be governed by and construed in accordance with the laws of the State of Texas.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement on the date first written above.

THE CITY:

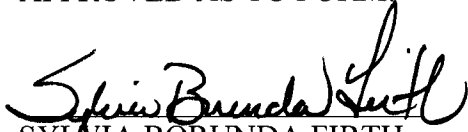
CITY OF EL PASO
a Texas municipal corporation

By: _____
JOE WARDY
Mayor


Attest:

RICHARDA DUFFY MOMSEN
City Clerk

APPROVED AS TO FORM:


SYLVIA BORUNDA FIRTH
Assistant City Attorney

APPROVED AS TO CONTENT:


WILLIAM A. CHAPMAN
Deputy CAO Financial and Administrative Services

THE FOUNDATION:

EL PASO COMMUNITY FOUNDATION

a Texas non-profit corporation

By: Richard H. Feuille
RICHARD H. FEUILLE
Chairman, Board of Directors

THE THEATRE CORP:

EL PASO PLAZA THEATRE CORPORATION

a Texas non-profit corporation

By: Virginia S. Martinez
VIRGINIA S. MARTINEZ
Vice President

PT ANNEX:

PT ANNEX, LLC

a Texas limited liability company

By: Janice W. Windle
JANICE W. WINDLE
President